

Town of Amherst
Zoning Board of Appeals 2013 DEC 19 PM 2: 53
SPECIAL PERMIT
AMHERST TOWN CLERK

The Amherst Zoning Board of Appeals hereby grants a Special Permit, ZBA FY2014-00009, to allow the extension of a pre-existing non-conforming use from a sorority to a Fraternity or Sorority building, social dormitory, or similar use related to Amherst College, Hampshire College, or the University of Massachusetts, at 38 Nutting Avenue (Map 11A, Parcel 87, R-G Zoning District), with the following conditions:

1. There shall be no more than 43 occupants residing on the premises.
2. A Resident Manager shall reside on the premises, and:
 - a. A Resident Manager shall be defined as: a non-undergraduate, live-in resident responsible for implementation of the property management plan and for managing and coordinating the maintenance, housekeeping, and administrative duties for the property.
 - b. The resident manager shall act as the liaison between the owner, lessee, and the neighborhood; responsible for the initial receipt and response to any complaints associated with the operation of the use. The name and contact information for the Resident Manager shall be submitted to the Amherst Planning Department and kept on file. Upon a change in the Resident Manager, a copy of updated information shall be submitted within one (1) month of said change.
3. While the property is owned by Alpha Chi Omega and occupied by its lessee, Pi Kappa Phi, the use and maintenance of the property shall be in accordance with the Management Plan approved by the Zoning Board of Appeals on December 3, 2013. The current tenants of the property shall comply with the supplemental information provided by Alpha Chi Omega and Pi Kappa Phi, as noted in the Management Plan, including subscription to the FIPG Risk Management Plan, UMass Office of Fraternities and Sororities Risk Management policy, and associated lease and house rules.
4. Upon a change in ownership of the property, a new management plan shall be submitted for review and approval by the Zoning Board of Appeals at a public meeting. Said Management Plan shall provide any information associated with, or under the responsibility of, the owner. Information shall include a copy of the new owner's lease agreement with any tenant and information pertaining to the Resident Manager, as required under Condition #2. If a change in tenancy is accompanied by a change in ownership, condition #5 shall apply.
5. Prior to a change in tenancy of the building, a revised Management Plan shall be submitted for review and approval by the Zoning Board of Appeals at a public meeting. Said Management Plan shall identify the relationship of said group to Amherst College, Hampshire College, or the University of Massachusetts and shall provide information related to rules and regulations governing said group. If a change in tenancy is accompanied by a change in ownership, condition # 4 shall also apply.

6. The parking shall be substantially in accordance with the parking plan approved by the Zoning Board of Appeals on December 3, 2013. A minimum of 20 spaces shall be provided and parking for no more than 26 vehicles shall occur on a regular basis. Parking shall occur only on paved surfaces. Any changes to the parking plan shall be submitted to the Board for a determination as to whether the change (s) are de minimus or significant to require a modification of the Special Permit.
7. The building shall contain no more than fourteen bedrooms and shall maintain the footprint as shown on the site/parking plan, approved by the Zoning Board of Appeals on December 3, 2013. Any structural alterations to the exterior of the building or interior changes resulting in an increase in the occupancy shall require modification of this Special Permit.
8. The use shall be operated in a manner to ensure that the property does not constitute a nuisance due to noise as defined under the Unlawful Noise provision of the General Bylaw. Violations of provisions of the Zoning Bylaw, or other Town bylaw's, may constitute evidence of non-compliance with the provisions of this permit.
9. There shall be no unlawful sale of alcohol from or on the premises.
10. There shall be no upholstered furniture allowed on the exterior of the premises.

Eric Beal 
Eric Beal, Chair
Amherst Zoning Board of Appeals

12/19/13
DATE

Town of Amherst
Zoning Board of Appeals - Special Permit

DECISION

Applicant/Owner: Alpha Chi Omega

Date application filed with the Town Clerk: October 31, 2013

Nature of request: For a Special Permit to determine whether the use of the property as a fraternity, sorority, social dormitory, or similar use related to Amherst College, Hampshire College, or the University of Massachusetts is not substantially more detrimental to the neighborhood than the existing use; and/or modify ZBA FY1966-23 and ZBA FY2005-00005, as applicable, under Section 9.22 and/or 10.33 of the Zoning Bylaw

Address: 38 Nutting Avenue (Map 11A, Parcel 87, R-G Zoning District)

Legal notice: Published on November 6, 2013 and November 13, 2013 in the Daily Hampshire Gazette and sent to abutters on November 4, 2013

Board members: Eric Beal, Tom Ehrgood, Yuri Friman

Staff members: Jeff Bagg, Senior Planner, Robert Morra, Building Commissioner, Katharine Doyle, Town Counsel

Submissions:

- Project Application Report, dated November 15, 2013
 - Application, filed with Town Clerk on October 31, 2013
- Submitted by Town staff:
- ZBA FY1962-15, ZBA FY1962-23, ZBA FY2005-00005, ZBA FY2012-00005
 - Existing Conditions Photographs and GIS

Public Hearing: November 21, 2013

- The following information was submitted during the hearing:
- Fraternal Information and Programming Group (FIPG), Risk Management Policy, July 2008 (Plaintiffs Exhibits p. 87-90)
- UMass Amherst Greek Life webpage information, September 4, 2013 (Plaintiffs Exhibits p. 197-225)
- Two Town GIS maps showing multifamily properties within 500 feet and non owner occupied properties within ¼ mile

Mr. Beal introduced there is a pending case in Superior Court related to this matter and noted that this proceeding is part of an attempt for the parties to resolve their differences.

The applicant was represented by Thomas Reidy and Mark Tanner of Bacon/Wilson, P.C. Mr. Reidy described the proposal as follows:

- The request is for a finding that the proposed change from a sorority to a “sorority, fraternity, social dormitory, or similar use related to Amherst College, Hampshire College, or the University of Massachusetts is not substantially more detrimental to the neighborhood than the existing use or substantially different in character”. As the base of the request is the existing use, the sorority, which became pre existing non conforming when the zoning map changed in 1988 from a district which allowed the use, to a residence district where the use was no longer allowed. The property is located in an area within the General Residence district and where it is surrounded on two sides by the ED district associated with UMass.
- Nothing is changing as far as the structure, parking area, number of cars, lot coverage, building height, setback, floor plan, landscaping, lighting, or number of occupants. The only thing changing is the “constitution” of the occupants. It is an extension of the pre existing non conforming use. The request is to allow the extension from just a sorority to those uses listed under Section 3.326; “fraternity, sorority, social dormitory”, etc.
- There are a lot of similarities between and amongst the category. First is the connection to an institution of higher education, whether it is UMass, Hampshire or Amherst College. As noted, all of them are listed within Section 3.326 in the Zoning Bylaw. The Zoning Bylaw regulated them under the same category and does not, for example, allow a fraternity in one district but not a sorority; they are all regulated the same.
- Within this type of Greek Affairs living, there is an additional layer of regulation specific to this use category and those that are in violation could lose their charter. They are also regulated under the Student Government Organization and are subject to the UMass student Code of Conduct. Neither of these regulations automatically apply to other off-campus student rental housing. There are also “intra” and “National” oversight of these organizations. Finally, this use category is also subject to bi-annual inspections from the Town’s Inspection Services, Health, and Fire Departments. This is something that would not be found in a typical rental or other off-campus student housing.
- The location on Nutting Avenue is suitable for this type of use. Within ¼ mile there are 73 non-owner occupied properties and 12 multifamily properties. The property abuts the University to the north and to an existing sorority immediately to the south.
- The request is to extend the uses to encapsulate the entire use category. The nexus between all the listed groups is the association with UMass or the other colleges. For example, it could be a group such as the Hillel House or some other configuration with a co-ed group associated with the University. It is not necessarily a “change” because it would be difficult to find that a change only in the gender of the occupants constitutes a change in use. It’s more appropriate to call it an extension from just sorority to the entire bylaw category. The change is a natural extension, not only in terms of the Bylaw but also under societal norms.

Mr. Beal noted that Section 9.22 of the Zoning Bylaw allows for an extension of a non-conforming use, unlike Chapter 40A, Section 6 which does not provide for alteration of uses, as follows:

The Special Permit Granting Authority authorized to act under the provisions of Section 3.3 of this bylaw may, under a Special Permit, allow a non-conforming use of a building, structure or land to be changed to a specified use not substantially different in character or in its effect on the neighborhood or on property in the vicinity. Said Authority may also authorize, under a Special Permit, a non-conforming use of a building, structure, or land to be extended, or a non-conforming building to be structurally altered, enlarged or reconstructed; provided that the Authority finds that such alteration, enlargement, or reconstruction shall not be substantially more detrimental to the neighborhood than the existing non-conforming use or non-conforming building.

Mr. Ehrgood noted that the request is for an extension of the use and asked the applicant to explain why the request is not a change in use. Mr. Reidy stated that it could be potentially discriminatory if it was considered a change in use because it would be the regulation of the occupants of this dwelling as opposed to the use. Ch 151B of MGL prevents discrimination, especially in housing. It would border on the line of discrimination. He also stated that there is testimony on record from Town officials that the change in occupancy is not a change in use in terms of the Zoning Bylaw.

Mr. Ehrgood stated that he looked up the term extension in the dictionary there are three definitions: 1) to extend in the sense of duration, 2) to stretch or pull out in terms of an extended telescope, 3) continued for a long period of time; or enlarged or broadened in meaning or scope. Mr. Reidy stated that it should be considered as an enlargement. Mr. Ehrgood stated that a remaining question is whether in these particular circumstances the extension would have a different impact. Mr. Reidy stated that the proposal to extend the use is not a change. He explained that information from the office of UMass Greek Affairs was provided. It articulates the regulatory standards that the University puts on "Greek life" and noted such things as: friendship, scholarship, leadership which embodies an appropriate Town/Gown relationship. In terms of management, the National Risk Policy provides the behavioral expectations. Mr. Tanner explained that the risk policy is created by a national organization which fraternities and sororities can choose to subscribe to. He stated that testimony indicated that both Alpha Chi Omega and the existing occupant, Pi Kappa Phi subscribe. He also noted that Michael Wisemen, Director of Greek Affairs for UMass, acknowledged that while not all groups subscribe to FIPG, those who don't follow it specifically often have other similar standards.

Mr. Beal asked whether a Management Plan, as listed in the ZBA Rules and Regulations would be provided, explaining that it typically accompanies a residential use proposal. During the 2012 case there was discussion about the property owner's responsibilities, and the responsibilities of the tenants. Additionally, a copy of the lease could be important in making the required findings. Mr. Reidy stated that those documents could be provided, but expressed concern with limiting the use to a specific group, such as Pi Kappa Phi, and noted that the current Special Permit for the sorority was never condition upon a specific management plan. Mr. Beal stated that a management plan is basic information for any application and is considered to be an integral component for a use under Section 3.326. Mr. Tanner stated that to the extent that the Management Plan requirements are reasonable and consider basic information about the overall use of the property, and that if the property changes ownership, the new buyer appears before the Board with their Management Plan.

Mr. Beal asked whether the current owner is seeking to sell the property. Mr. Tanner stated that the property has been on the market for over two years and that the current tenant has an offer to purchase the property. That sale has been delayed due to the litigation. Aside from fraternities, the only entities that have shown interest in the property were live-in residences from people with chronic addictions or diseases -- mainly due to the interior layout of the facility. The ideal purchaser would be another sorority, fraternity, or similar group. A recent trend related to a reduction in available funding has diminished the number of sororities that exist.

Mr. Beal asked about whether there will be a resident manager, or similar person, on-site. Mr. Tanner explained that, according to the Director of Greek Affairs, the trend both at UMass and nationally is to require some sort of non-undergraduate person living on-site. The owner, Alpha Chi Omega, is accepting of such a condition on the current tenant and any future tenant where there is an onsite resident who will then be responsive to the Town, University, or Greek Affairs.

Mr. Ehrgood stated that there is a threshold point beyond which something is no longer an extension of a use. The Board must consider whether the extended use fits within the use category after consideration of its characteristics. A management plan would not be for a platonic form, but for a specific use. Mr. Tanner stated that it is not necessarily per use, but per group. Mr. Ehrgood stated that the term "use" in that sense, refers to the group or tenant.

Mr. Ehrgood asked how the house rules and other regulations relate to the management of the property. Mr. Tanner stated that there is a lease between Alpha and the current tenant. That lease requires that the current tenant abide by the rules and regulations that Alpha Chi Omega has in place. He explained that part of the lease deals with an outside property manager who is hired to take care of the outside of the facility. Additionally, there are internal regulations for both Alpha Chi Omega and the current tenants. He noted that at the Chapter level, there are undergraduates who are assigned certain leadership responsibilities, including a House Manager. That person is responsible for ensuring that their peers are following the house rules, with disciplinary procedures. Alpha Chi Omega is agreeable to a condition that requires any prospective buyer to require a resident manager.

Mr. Ehrgood stated that the permit has to be for some entity. Mr. Tanner stated that the permit would be broad enough to allow a range of entities be qualified to live there subject to conditions and which require a Management Plan approved by the Board.

Mr. Beal referenced the Special Permit application requirements noting that the applicant has requested a waiver from them. However, the Management Plan would be the type of document that would be fair to request in this case, noting that the current owner is akin to a landlord. The Management Plan provides for basic information about the use. The idea is that if a Special Permit is granted, and a new buyer comes back at a public meeting with a new Management Plan and their rules and regulations. Mr. Tanner stated that they can submit a Management Plan for the current use and owner but cannot do the same for a prospective buyer. Mr. Bagg stated that a Management Plan for the current owner would provide baseline information about the use and management of the property. Additionally, a condition on the permit could require a future owner to provide updated information related to the overall property, and then some information more specific to a change in tenant.

Mr. Beal also asked for written information about the role of the house manager. Mr. Tanner stated that the house manager has dual responsibilities including management of the house but also administering the Greek affairs aspect. Mr. Bagg stated that a condition of the permit may be applied which requires there be a resident manager responsible for meeting the definition in the Zoning Bylaw. Mr. Tanner expressed some concern with some of the vague language, but that in general, they were agreeable to that type of condition.

Mr. Beal noted a requirement, under Section 10.323, which requires a site plan be approved as part of a Special Permit. Mr. Tanner noted a site plan associated with the original 1962 permit but that he didn't know if there had been changes to the building or parking. Mr. Bagg stated that there are inaccuracies in the site plan, such as it shows a horseshoe driveway in the front yard. Mr. Morra noted that a basic layout from the GIS showing parking, or the site, would be useful. Mr. Bagg noted that a GIS map of the building printed to scale would be sufficient along with some type of dimensionalized plan showing the total number of parking spaces available on the adjacent parcel would be sufficient since none of the existing conditions are changing.

Mr. Friman asked about the surface of the parking lot, noting that it looked like it was dirt. Mr. Reidy stated that he believed it was gravel and noted a condition in the 1962 permit about the surface. Mr. Beal asked how many parking spaces there are currently. Mr. Tanner stated that the 1962 permit required there be parking for a minimum of 20 spaces but that there is not a layout. Mr. Tanner noted that there is no proposal for additional tenants and that the 2005 permit noted that no changes were proposed and there are no changes proposed now.

Mr. Ehrgood referenced the findings in the 2012 decision and noting that there should be some statement made which is the basis for not embracing those findings in order to allow the Board to find now that the change is not substantially more detrimental. Mr. Tanner explained that the distinction is that in this case it is a question as to whether the extension is more detrimental than the existing use. The previous case considered whether the use of the property by a sorority was an entirely different use than a fraternity. He stated that the submitted information about the house rules and regulations from Greek Affairs shows that the two groups are regulated exactly the same way and are the same use. Mr. Ehrgood asked for an opinion from Town Counsel. Ms. Doyle stated that she agreed with Mr. Tanner that what was being considered in 2012 pertained to a change in use and therefore required a different standard. It was a question of whether or not the cease in desist was properly issued and whether the change in occupancy from a sorority to a fraternity was an entirely different use altogether.

Mr. Ehrgood stated that he does not see an obstacle to reaching the conclusion that the change will not be more detrimental, but the factual findings in the 2012 decision are not irrelevant. He asked if the factual basis of the decision of the Building Commissioner back in 2012 have been disavowed or needs to be acknowledged as irrelevant. Mr. Beal explained that the 2012 issue was broader in its scope and stated that it wasn't relevant to go back to that case to render a decision in this matter. Mr. Bagg stated that what occurred in 2012 isn't before the Board at this time. That decision was appealed and that process has resulted in this separate and distinct application. Mr. Beal noted that it has been applied for as part of a resolution of that matter. Mr. Ehrgood stated that the applicant asserts that because the two groups are all Greek organizations and subject to the same rules there's not going to be any difference or impact on the neighborhood.

Mr. Tanner stated that a review of the police calls for the last two years when a fraternity has occupied the space, it was actually less than when it was occupied by a sorority. He stated that the historical statistically data that the panel relied on in the first decision has proven to not be accurate and that is a problem with the reliance only on data.

Mr. Beal stated that perhaps the past two years can be further discussed but noted that a lot of the data associated with the 2012 permit was used to show that there was a rational basis for the bylaw. That issue isn't before the Board with this application. In that case, the Board wasn't discussing a specific fraternity; it was considering a sex-based classification in the Bylaw and whether a fraternity was different than a sorority. Mr. Tanner said that the data from the last couple years shows that there were not a lot of complaints while the fraternity was occupying the building. Mr. Reidy submitted police incidence calls from 38 Nutting Avenue. The call list shows that in 2013 there were two calls. In 2012 there were eight; in 2011 there were 15; and the fraternity was there for part of that time. In 2010 there were seven, in 2009 there were 18. Mr. Beal noted that the fraternity occupied the building in approximately August 2011. Mr. Reidy stated that the number of police calls prior to the occupancy by the fraternity were actually more. Since then there has been a decline in the number of calls.

Mr. Friman noted that the number of complaints did not rise with the fraternity. However, how do we account for the transient nature of students who occupy the building for relatively short periods of time. Mr. Tanner stated that in this situation, the control mechanisms in place are important. For example, in this case there are other regulations in place which do not apply to other residential rental uses. Those include the internal chapter governance, the national governance, UMass Greek Affairs, and the SGO office on campus which requires compliance with the Student Code of Conduct. He stated that even though the students are transient, the overall use is heavily regulated.

The following members of the public spoke regarding the application:

- Merl Right, 32 Nutting Avenue, stated that she is the property manager and house director for the Kappa Kappa Gamma sorority which occupies that building. The fraternity has been good neighbors since they've been in the building. Both groups use the same trash hauler and landscape company. The fraternity members have not caused any problems with noise or other nuisances. The fraternities and sororities are governed by their internal rules as well as being inspected by the Town twice annually with the occupancy of the building set by the Fire Department.
- Maurianne Adams, 16 Beston Street, stated that she is employed in the Resident Life Department at the University and acknowledged that the enforcement of certain regulations can be limited and is contingent upon having a resident manager. She stated that having an adult onsite is critical to ensuring that the behavior of groups of students can be managed. She stated that another major concern is the use of alcohol and it's correlation to the number of police calls.
- Joan Burgess, 36 Mount Pleasant, stated that the Board should restrict the issuance of this Special Permit to the current tenants only. She noted that this type of condition has been applied in other cases. She expressed concern with the precedent that may be set by opening up the use of the building by other groups. She also expressed concern about and stated that an adult, rather than a non-graduate student, should be required to be the onsite manager. She stated that she understands that sororities do not allow alcohol, but the current fraternity tenant does and this is a significant difference between the two groups with respect to a potential impact on the neighborhood.

Mr. Tanner is willing to have resident manager will be a non-undergraduate member of the fraternity. Mr. Beal asked for a description of job duty or responsibilities. Mr. Tanner stated that he wasn't aware as to whether the existing fraternity had such a person, but there would be one going forward. In terms of responsibilities, those listed in the Zoning Bylaw would be acceptable. Mr. Friman asked whether there would be a system for people to get in touch with whoever is the resident manager. Mr. Tanner stated that perhaps it could be identified within the Management Plan, which is a public document. He also noted that Greek Affairs would certainly have the information on file. Mr. Bagg may have some ideas as to how to disseminate that information.

Mr. Beal noted that it has been handled in different ways, but connecting it to the Management Plan would be logical. Mr. Friman asked what would happen if the resident manager changes? Mr. Beal noted that there is not a definitive method, but perhaps contacting Greek Affairs. Mr. Beal also mentioned an option that if the resident manager changes that the revised information be submitted to the Planning Department and kept on file.

Mr. Beal identified that the sale of alcohol is prohibited within the lease. Mr. Tanner stated that the Greek Affairs office has a process in place for registration of parties. He indicated that Mr. Wiseman stated that they do spot checks and is a mechanism that does not apply to other standard rental properties in Town. Mr. Tanner noted testimony that there was at least one sorority that allowed alcohol and that the policy was an internal policy and is not a law or imposed by some outside entity. Additionally, the policy has is amendable under certain conditions. He noted the lesser number of police calls while the fraternity occupied the building despite the difference in policies concerning alcohol.

Mr. Bagg asked about reference to the office of Greek Affairs at UMass and whether some of the "social dormitory" or similar uses would fall under those regulations. Mr. Tanner stated that those groups would be overseen by the SGO and would be some contact with that office. Mr. Bagg noted that the question is related to the broadening or extension of the use to these other groups and that a Management Plan for one of those types of groups would have to identify the connection to UMass, Hampshire or Amherst College to ensure that it remains within this use category.

Ms. Right noted that she has done this for over 20 years and the sorority (ITU) that allows alcohol they do not have a national office and consider them an underground sorority and don't have the rules that other national organizations do. She stated that her sororities or those with national offices do not allow alcohol in their houses. If they are caught with alcohol they could be subject to losing their charter. Mr. Beal noted there may be a difference between the alcohol policy of the sorority and this fraternity but based on the police calls it doesn't appear that there have been an escalation in alcohol related activity. Mr. Ehrgood stated that the allowance of alcohol alone is not the problem it's when that use results in objectionable behaviors.

Ms. Burgess stated that it was her understanding that the current fraternity was operating under a lease with the sorority which includes the provision that they are following the same rules and doesn't that conflict with the differences in alcohol policies? Mr. Tanner stated that they are, by their lease, bound by Alpha Chi Omega's rules. He noted that testimony during the trial regarding the consumption of alcohol at the premises which is not in line with what the lease says. However, the police reports show that that does not correlate to an increase the number of police calls to the premises. Mr. Friman asked if ACO has responded to the breaking of the lease? Mr. Tanner stated that ACO's principal concern was that the tenants are good tenants and neighbors and members of the community. If you look at what the existing fraternity has done in the community, it is positive. He acknowledged that if the tenants are meeting the other criteria, they have chosen to overlook that limitation.

Mr. Friman noted that often the ZBA relies on information in the lease and asked how other provisions of the lease can be considered as regulating the tenants. Mr. Tanner noted that that question could be asked of any document. The distinction is that when someone brings a Management Plan with certain provisions that are being violated, the Town can act to enforce the Management Plan and noted that it is really the conditions of the permit that are the most enforceable. Mr. Beal noted that the ZBA has requested information be in the lease as a mechanism to allow a landlord to compel certain behavior, but can't compel the landlord to enforce the lease provision.

Ms. Adams asked whether this use would be subject to the Rental Permitting Bylaw. Mr. Morra responded that yes it would.

Ms. Burgess express concern about the current tenants not abiding by the lease agreement stating that the situation may be fine now, with the current tenant, but worries about the next tenant. She stated that this is why she believes the permit should be granted to allow the current tenant only. Mr. Beal noted that the Board has dealt with this question in several ways, in some cases the most restrictive and other cases the least restrictive. In this case the property currently operates under a Special permit that does not have any provision that it expire upon change of ownership or tenancy. He stated that if the permit were granted that the condition could require a new owner to provide a new Management Plan, with a resident manager component, and that the use will continue under similar management provisions as the current tenant. He noted that a similar mechanism would likely also be required for a change in tenancy. For example, if a different Greek organization decided to lease the property, the Town would want to have their management plan and resident manager information. Mr. Bagg noted that the Board could request an over-arching Management Plan for the property provided by the owner and then a management plan for individual tenants. Mr. Ehrgood asked what over-arching meant. Mr. Bagg stated that there would be a Management Plan submitted with ACO as the owner with whatever the tenant group is. Then if the property sells to a new organization, such as Pi Kappa Phi, they as owners would submit a new Management Plan and if the tenant changed, a new management plan describing who the new tenant is and how they are related to UMass, Hampshire or Amherst College would be provided. The Board members acknowledged a general agreement with this concept.

Mr. Bagg sought clarification on the discussion related to alcohol noting that if granted the permit would not have any specific condition related to alcohol use on the premises. Mr. Beal noted that the information submitted shows that the current arrangement is working and that a specific condition related to alcohol use on the premise doesn't seem necessary.

Mr. Ehrgood noted that a condition related to no sale of alcohol was contemplated. Mr. Tanner stated that he couldn't see a problem with prohibiting the sale of alcohol.

Mr. Beal suggested the Board hold off on a detailed discussion of conditions until the new information is provided. He reviewed a list of information to be brought back at the next hearing:

- A Management Plan which would incorporate a resident manager provision, house rules, national Pi Kappa Phi
- A copy of the lease with the understanding that the owner is not enforcing the no alcohol provision in the lease
- A basic site plan depicting the parking and its relationship to the parcel.
- A basic parking plan showing the existing conditions and overall number of spaces

Mr. Bagg sought clarification that the maximum number of 43 occupants listed in the 2005 permit was to be carried forward with this permit if it is granted. Mr. Tanner stated that there is no proposed increase in the number of tenants.

Mr. Beal noted the other application requirements and asked whether a floor plan should be required. Mr. Morra stated that Inspection Services inspects the property with the Health Department and Fire Department and noted that a floor plan may not be necessary in this case.

Mr. Beal MOVED to waive the requirement for building plans, landscaping plan, lighting plan, sign plan, soil erosion, and written project summary with the understanding that the site plan and management plan are to be submitted. Mr. Ehrgood seconded the motion and the Board VOTED unanimously.

Mr. Beal MOVED to continue the evidentiary portion of the public hearing to December 3, 2013. Mr. Ehrgood seconded the motion and the Board VOTED unanimously to continue the public hearing.

Continued Public Hearing - December 3, 2013

The applicant was represented by Thomas Reidy and Mark Tanner of Bacon/Wilson, P.C. The following new information was provided and reviewed:

- In one packet
 - Sample lease between Alpha Chi Omega and Pi Kappa Phi
 - Pi Kappa Phi "gold book"
 - Pi Kappa Phi house director job description
 - Pi Kappa Phi "housing bylaw"
 - Alpha Chi Omega "facilities" information
 - Alpha Chi Omega "Risk Management"
 - Alpha Chi Omega sample local chapter bylaws
 - Town of Amherst "inspection list for fraternities and sororities"
 - UMass Office of Fraternities and Sororities Risk Management procedures
 - UMass Office of Fraternities and Sororities guidelines for facilities

Mr. Beal noted that the lease agreement was for 2010 to 2011 and asked if there was a more current copy of the lease available. Mr. Tanner stated that there is a more current lease. However, the lease agreements are identical with the exception of a notation in the new lease pertaining to the lawsuit.

Mr. Beal asked whether the lease agreement which stated that the tenant shall comply with the Alpha Chi Omega rules. Mr. Tanner stated that since the last hearing he reviewed the lease and found that it does not contain a prohibition on the consumption of alcohol.

Mr. Beal noted that the Board normally requires a Complaint Response Plan for similar uses and asked how a complaint might be handled. Mr. Tanner stated that this would be one of the roles of the Resident Manager. The Board discussed adding some language into the description of the Resident Manager to identify that would be one of the responsibilities. Mr. Tanner agreed to some language which describes the Resident Manager as being a liaison between the owner and lessee and the neighborhood and would be responsible for receiving and responding to complaints.

Mr. Beal noted that the lease contains a provision that violations of the Town noise bylaw could result in administrative discipline. He stated that, such as has been done in other permits, a condition of this permit should be that violations of the noise bylaw shall be deemed a violation of the Special Permit.

The Board discussed the submitted parking plan. Mr. Reidy stated that the plan was prepared based on the Town's GIS and that the approximate measurements of the existing paved area can accommodate 26 space using the current required space size of 9 feet wide by 18 feet long. The Board determined the following:

- The 1962 Special Permit required that parking be provided for at least 20 vehicles and that the surface be hard-packed to prevent dust. This plan provides the minimum number of required spaces and finds that the surface is adequate to meet that requirement.
- The 26 parking spaces shown on the plan should be the baseline for the current and future use. Parking shall be substantially in accordance with that plan. The Board noted that any expansion of the parking area should be reviewable. However, if 2 or 3 more cars can park in an organized manner, it may be considered substantially in accordance with the plan.
- The parking for the use is grandfathered. Providing that the conditions of the 1962 permit are met, there are no proposed changes and therefore no trigger for the parking area to come into compliance with current standards.
- There have been no complaints regarding the current parking configuration. Excess parking for other tenants could be found on the campus of UMass.

The Board discussed the proposal, which includes "social dormitory and similar use", in addition to a fraternity or sorority.

- Mr. Tanner stated that an example would be the Hillel House, a business or other type of fraternity, or some group with somehow affiliated with the University. Mr. Tanner stated that the Board may be ultimately responsible for making that distinction, based on a specific use proposal, but that the Building Commissioner would likely be consulted for an initial determination. Mr. Reidy stated that the nexus between a group and the institution narrows down the types of uses that may be in the building. Mr. Reidy stated that the category, in general, and the terminology require that it be related to the institution and that the relationship narrows down the potential use. Mr. Beal stated that it sounds like it would be a residential use for students of the three institutions.
- Mr. Ehrgood stated that the key words are "related to" and that implies a group is "officially acknowledged". Amherst College has some underground fraternities. By the definition, these groups are not formally related to Amherst College and wouldn't fit into the definition. He stated that the group must have some type of institutional relationship, noting that this is not a group of students residing on their own without an institutional nexus where there is a meaningful framework in which the two are operating in relation to one another. Mr. Reidy stated this would likely be considered on a case by case basis in consultation with the Zoning Enforcement Officer and/or the Zoning Board of Appeals.
- Mr. Bagg asked whether mere enrollment in the institution would be enough to be considered the relationship. Mr. Ehrgood stated that the initial answer would be no. The use category contemplates an entity which is in relationship to the institution. The enrollment alone doesn't provide enough of the relationship. Mr. Beal stated that the Board would have to review each situation as it is presented them.

- Mr. Tanner provided the example where 20 members of the football team got together; who are all enrolled at the University and wanted to rent the house, the Building Commissioner would review the Zoning Bylaw and determine if the use fits. He indicated that the things considered might be a comparison to the other groups listed in the category; noting they are all groups that have some formal relation to, and are somehow otherwise regulated by the University. He noted that 20 people simply living together do not appear to meet those criteria. Mr. Friman asked whether the term "formally" could be added to describe the "related to". Mr. Beal stated that the condition to require a review of the Management Plan would allow the Zoning Board the opportunity to review the relationship and potentially determine that a group would be a boarding house type of use, not a "social dormitory or similar use". Mr. Ehrgood noted the importance of the institutional relationship. Adding that it is the relationship between an entity and the University and not the relationship of an individual tenant and the University. Mr. Tanner provided an example of other cases in other states where a fraternity lost its charter and the court determined that it lost its pre-existing non-conforming use status.
- Mr. Bard noted that a "team" concept might apply if the group had an existing relationship, group identity, or connection to the institution. The difference might be that a group of people who become acquainted and then seek to live together would not qualify. However, if the group were organized by a coach or teacher who either reside in the same location or provide evidence that living together adds to or contributes to a relationship or team might work.

The following members of the public spoke regarding the application:

- Elisa Rubenstein, 38 Fearing Street, noted that she submitted an email and expressed concern that this decision would open the door for the remaining four other sororities to be changed to fraternities. She stated that this would have a negative impact on the neighborhood and would negate the reduction in the number of fraternities since the Bylaw changed in 1988. She asked whether this sets a precedent. Mr. Beal stated that the Board is not ruled by precedent, and although there are attempts to make consistent decisions, each application would have to be judged and determined on its own merits.
- Joan Burgess, 36 Mount Pleasant, stated that she's opposed to the issuance of the Special Permit. However, if it is granted, she recommends that the Board impose a condition which requires a new owner and/or tenant to get a new Special Permit. She referred to the requirement that the use be related to one of the institutions and stated that a group of football players should not qualify. They don't have a charter or any independent rules. Additionally, they are likely to be more transient in nature with no formal organization or institutional connection. Mr. Friman stated that it seemed that a condition requiring that there be a "related to" component allows the Board to identify and gather information regarding any of the group's rules and regulations.
- Maureen Adams, 16 Beston Street, asked whether this use requires a rental permit and whether, for example, a pattern of noise violations or nuisance issues, could result in revocation or fines. Mr. Morra stated that yes the provisions of the rental permitting bylaw would apply to this use. She stated that she does not believe the Special Permit should be granted to extend a pre-existing non-conforming use, as the goal should be to eliminate them. However, if the permit is granted she stated that there should be emphasis the importance of requiring a Resident Manager to be responsible for the use.

- Gretchen Fox, 90 Fearing Street, asked if this discussion is related to a change of ownership or tenants. Mr. Tanner stated that the current tenants, Pi Kappa Phi fraternity has a right of first refusal offer on the purchasing the property. However, the sale cannot occur while the matter is in court.
- Winnifred Manning, 61 Fearing Street, expressed concern regarding the change in the alcohol policy between the two groups. She stated that the permit should be granted to only this owner and this tenant citing concerns about the vagueness of the requirement for tenants to be related to one of the institutions.

Mr. Ehrgood MOVED to close the evidentiary portion of the public hearing. Mr. Beal seconded the motion and the Board VOTED unanimously to close the public hearing.

Public Meeting/Specific Findings:

The Board found under Section 9.22 of the Zoning Bylaw, the following:

9.22 - The Special Permit Granting Authority authorized to act under the provisions of Section 3.3 of this bylaw may, under a Special Permit, allow a non-conforming use of a building, structure or land to be changed to a specified use not substantially different in character or in its effect on the neighborhood or on property in the vicinity. Said Authority may also authorize, under a Special Permit, a non-conforming use of a building, structure, or land to be extended, or a non-conforming building to be structurally altered, enlarged or reconstructed; provided that the Authority finds that such alteration, enlargement, or reconstruction shall not be substantially more detrimental to the neighborhood than the existing non-conforming use or non-conforming building. The Board finds that the proposal complies with the requirements of Section 9.22, for the following reasons:

- The number of occupants is limited to 43 residents, the same number established by the 2005 Special Permit for the sorority use. Additionally, the number is a significant reduction from the original number of tenants allowed in the 1962 Special Permit.
- A Resident Manager will be provided onsite for the existing and future uses. This is a new requirement that was not specifically required as part of the previous use/Special Permit. The Board finds that this is a benefit of granting the Special Permit.
- A new Management Plan is required to be reviewed and approved by the Zoning Board of Appeals prior to a change in occupancy. This will allow the Board to ensure that a future tenant provide adequate information to determine that the tenants are related to one of the institutions.
- The extension of the use in this case does not require any changes to the parking lot area and no changes to the interior or exterior of the building are required.

The Board finds under Section 10.38 of the Zoning Bylaw, Specific Findings required of all Special Permits, that:

10.380 & 10.381 - The proposal is suitably located in the neighborhood in which it is proposed and/or the total Town, as deemed appropriate by the Special Permit Granting Authority; The proposal is compatible with existing Uses and other Uses permitted by right in the same District. The use of the property as a sorority has existed for over 50 years. The change in tenancy does not increase the number of people who will reside in the building. Additionally, the use is limited to those groups that maintain a relationship with the Amherst College, Hampshire College, or the University of Massachusetts. Therefore, the extension of the residential use to similar numbers of people will not have a substantially different effect on the neighborhood, as found under Section 9.22. The location of the property is immediately adjacent to the UMass campus to the north and other multi-family properties, and non-owner occupied residences in the vicinity.

The Board noted that some owner occupied properties do exist in the area, and that the requirement for a Resident Manager for the current and future uses offers a protection to the neighborhood that would not exist without this Special Permit.

10.382, 10.383 & 10.385- *The proposal would not constitute a nuisance due to air and water pollution, flood, noise, odor, dust, vibration, lights, or visually offensive structures or site features; The proposal would not be a substantial inconvenience or hazard to abutters, vehicles or pedestrians; The proposal reasonably protects the adjoining premises against detrimental or offensive uses on the site, including air and water pollution, flood, noise, odor, dust, vibration, lights or visually offensive structures or site features;* The Board finds that the proposal complies with these requirements for the following reasons:

- No interior or exterior changes to the building are required for the extension of the use. The exterior lighting will remain unchanged and no changes to the parking area are required.
- The use is limited to those groups that maintain a relationship with the Amherst College, Hampshire College, or the University of Massachusetts. This requirement provides that there are rules and regulations that may exist which govern the group of residents. Additionally, the use as approved is subject to bi-annual inspections by the Town's Inspection Services, Fire and Health Departments.

10.384 & 10.389 - *Adequate and appropriate facilities would be provided for the proper operation of the proposed use; The proposal provides adequate methods of disposal and/or storage for sewage, refuse, recyclables, and other wastes resulting from the uses permitted or permissible on the site, and methods of drainage for surface water.* The proposal provides the minimum number of parking spaces required under the original permit; maintains the same number bedrooms for the number of occupants; and the Management Plan ensures that trash disposal and snow removal will be completed.

10.386 & 10.387 - *The proposal ensures that it is in conformance with the Parking and Sign regulations (Articles 7 and 8, respectively) of this Bylaw; The proposal provides convenient and safe vehicular and pedestrian movement within the site, and in relation to adjacent streets, property or improvements. If the Special Permit Granting Authority deems the proposal likely to have a significantly adverse impact on traffic patterns, it shall be permitted to require a traffic impact report, and the proposal shall comply with Section 11.2437 of this Bylaw.* No changes to the existing parking arrangement are proposed. The Board finds that the parking is in compliance with the requirements of the 1962 Special Permit, and is therefore exempt from current requirements. A condition of the permit requires that substantial modifications of the parking area could require modification of the Special Permit.

10.392 - *The proposal provides adequate landscaping, including the screening of adjacent residential uses, provision of street trees, landscape islands in the parking lot and a landscape buffer along the street frontage.* There are no changes proposed to the exterior of the building or site. Existing landscaping will be maintained pursuant to the approved Management Plan.

10.398- *The proposal is in harmony with the general purpose and intent of this Bylaw, and the goals of the Master Plan.* The proposal to extend the existing use is in harmony with the purpose of the Bylaw, specifically that the extension of use provides for "the most appropriate use of land" based on the historical use of the property and that there are no physical changes. The Board finds that the extension meets the goal of the Master Plan to "preserve and expand the number of affordable and moderately priced rental and ownership units in the housing stock".

Public Meeting – Zoning Board Decision

Mr. Beal MOVED to approve the application with conditions. Mr. Ehrgood seconded the motion.

For all of the reasons stated above, the Board VOTED unanimously to grant a Special Permit, ZBA FY2014-00009, to allow the extension of a pre-existing non-conforming use from a sorority to a Fraternity or Sorority building, social dormitory, or similar use related to Amherst College, Hampshire College, or the University of Massachusetts, at 38 Nutting Avenue (Map 11A, Parcel 87, R-G Zoning District), with conditions.

Eric Beal
ERIC BEAL

Tom Ehrgood
TOM EHrgOOD

Yuri Friman
YURI FRIMAN

FILED THIS 19th day of Dec, 2013 at 2:50 pm
in the office of the Amherst Town Clerk Andrea J. Burger
TWENTY-DAY APPEAL period expires, 20th day of December, 2013.
NOTICE OF DECISION mailed this 20th day of December, 2013
to the attached list of addresses by Jeffrey L. Bazz, for the Board.
COPY OF NO APPEAL issued this day of , 2013.
NOTICE OF PERMIT or Variance filed this day of , 2013,
in the Hampshire County Registry of Deeds.

THE COMMONWEALTH OF MASSACHUSETTS
AMHERST

City or Town
NOTICE OF SPECIAL PERMIT
Special Permit
(General Laws Chapter 40A)

Notice is hereby given that a Special Permit has been granted

To Alpha Chi Omega
Address 5939 Castle Creek Parkway North Drive
City or Town Indianapolis, Indiana 46250

Identify Land Affected: 38 Nutting Avenue
(Map 11A, Parcel 87, R-G Zoning Districts)

By the **Town of Amherst Zoning Board of Appeals** affecting the rights of the owner
with respect to the use of the premises on

38 Nutting Avenue Amherst
Street City or Town

The record of title standing in the name of
Alpha Chi Omega National Housing Corporation
Name of Owner

Whose address is 5939 Castle Creek Parkway North Drive Indiana 46250
Street City or Town State Zip Code

By a deed duly recorded in the
Hampshire County Registry of Deeds: Book 8390 Page 1
or

Hampshire Registry District of the Land Court, Certificate No. _____,
Book _____, Page _____

The decision of said Board is on file, with the papers, in ZBA FY2014-00009
In the office of the Town Clerk Sandra J. Burgess

Certified this _____ day of _____

Board of Appeals:

Eric Beal JA Chairman
(Board of Appeals)
Tom Ehrgood JB Clerk
(Board of Appeals)

_____ at _____ o'clock and _____ minutes _____ m.
Received and entered with the Register of Deeds in the County of Hampshire
Book _____ Page _____

ATTEST _____
Register of Deeds
Notice to be recorded by Land Owner

**BOARD OF APPEALS
AMHERST, MASSACHUSETTS
RECORD OF APPEALS AND DECISION RENDERED**

Petition of Alpha Chi Omega

For a Special Permit, ZBA FY2014-00009, to allow the extension of a pre-existing non-conforming use from a sorority to a Fraternity or Sorority building, social dormitory, or similar use related to Amherst College, Hampshire College, or the University of Massachusetts, with conditions

On the premises of 38 Nutting Avenue
At or on Map 11A, Parcel 87, R-G Zoning District

NOTICE of hearing as follows mailed (date) December 20, 2013
to attached list of addresses and published in the Daily Hampshire Gazette
dated November 6, 2013 and November 13, 2013

Hearing date and place November 21 and December 3, 2013 (Town Hall)

LEGAL NOTICE
The Amherst Zoning Board of Appeals will meet on ***Thursday, November 21, 2013*, at 6:30 P.M. in the TOWN ROOM, Town Hall, to conduct the following business:**
PUBLIC HEARING:
ZBA FY2014-00009--Alpha Chi Omega - For a Special Permit to determine whether the use of the property as a fraternity, sorority, social dormitory, or similar use related to Amherst College, Hampshire College, or the University of Massachusetts is not substantially more detrimental to the neighborhood than the existing use; and/or modify ZBA FY1966-23 and ZBA FY2005-00005, as applicable, under Section 9.22 and/or 10.33 of the Zoning Bylaw at 38 Nutting Avenue (Map 11A, Parcel 87, R-G Zoning District).
ERIC BEAL, CHAIR
AMHERST ZONING BOARD OF APPEALS
3276443 November 6, 13

SITTING BOARD and VOTE TAKEN:

To grant a Special Permit, ZBA FY2014-00009, to allow the extension of a pre-existing non-conforming use from a sorority to a Fraternity or Sorority building, social dormitory, or similar use related to Amherst College, Hampshire College, or the University of Massachusetts, with conditions

Eric Beal - Yes Tom Ehrgood - Yes Yuri Friman - Yes

DECISION: APPROVED with conditions as stated in permit

Town of Amherst Abutter List

Parcel ID	Parcel Address	Owner1	Owner2	Address	City/Zip
11A-44	26 ALLEN ST	SHAFIE ARDESTANI, REZA & SHOHREH		99 WILDFLOWER DR	AMHERST, MA 01002
11C-97	85 FEARING ST	WELCOME, WARD		85 FEARING ST	AMHERST, MA 01002
11A-31	NORTH PLEASANT ST	RESEARCH SUPPORT FUND	C/O GERALD EPSTEIN - GORDON HALL	418 NO PLEASANT ST SUITE 1	AMHERST, MA 01002
8C-13A	NORTH PLEASANT ST	COMMONWEALTH OF MASS	C/O JUANITA HOLLER ASSOC VICE CHANCELLOR	337 WHITMORE UMass	AMHERST, MA 01003
11A-30	418 NORTH PLEASANT ST	RESEARCH SUPPORT FUND	C/O GERALD EPSTEIN - GORDON HALL	418 NO PLEASANT ST SUITE A	AMHERST, MA 01002
11A-29	434 NORTH PLEASANT ST	FIRST BAPTIST CHURCH		434 NORTH PLEASANT ST	AMHERST, MA 01002
11A-88	NUTTING AVE	ALPHA CHI OMEGA HOUSE CORP	C/O CATHERINE ZEINER	5939 CASTLE CREEK PKWY DR	INDIANAPOLIS, IN 46250-4343
11A-42	NUTTING AVE	KAPPA KAPPA GAMMA INC		270 ALPINE DR	AMHERST, MA 01002
11C-101	18 NUTTING AVE	SLAKEY, LINDA L		18 NUTTING AVE	AMHERST, MA 01002
11C-105	19 NUTTING AVE	BERKSHIRE TERRACE PARTNERS LLC	C/O EAGLECREST PROPERTY MNGMNT	55 NO PLEASANT ST	Amherst, MA 01002
11C-102	22-24 NUTTING AVE	WASKIEWICZ, RICHARD D TRUSTEE OF REV TRU		199 GLENDALE RD	AMHERST, MA 01002
11C-104	25 NUTTING AVE	MALEKNIAZ, MOHAMMAD H & SIMIN D		474 SPRING ST	LEEDS, MA 01050
11C-103	28-30 NUTTING AVE	WASKIEWICZ, RICHARD D TRUSTEE OF REV TRU		199 GLENDALE RD	AMHERST, MA 01002
11A-43	32 NUTTING AVE	KAPPA KAPPA GAMMA INC	C/O KRISTIN HOVEY	8 SHAW PL	FOXBORO, MA 02035

<i>Parcel ID</i>	<i>Parcel Address</i>	<i>Owner1</i>	<i>Owner2</i>	<i>Address</i>	<i>CityStZip</i>
11A-37	38 NUTTING AVE	ALPHA CHI OMEGA NATIONAL HOUSING CORP		5939 CASTLE CREEK PKWY N DR	INDIANAPOLIS, IN 46250-4343
11A-34	19 PHILLIPS ST	BRIGGS,GREGORY & PAUL, HOWARD R		29 HENRY ST	AMHERST, MA 01002-3016
11A-35	23 PHILLIPS ST	TURNER, JAMES R		23 PHILLIPS ST	AMHERST, MA 01002
11A-36	27-29 PHILLIPS ST	RAILROAD STREET PARTNERS LLC	C/O EAGLECREST PROPERTY MNGMT	55 NORTH PLEASANT ST	AMHERST, MA 01002
11A-37	33 PHILLIPS ST	KNIGHT PROPERTIES LLC	C/O STEPHAN GHARABEGIAN	405 WALTHAM # 396	LEXINGTON, MA 02421
11A-38	37 PHILLIPS ST	COLLEGE ST PROPERTIES LLC	C/O GHARABEGIAN, STEPHAN	405 WALTHAM ST #396	LEXINGTON, MA 02421
11A-93	41 PHILLIPS ST	HAUGHTON, LAURA J & REGINALD C JR		110 BALDWIN HILL RD	PHILLIPSTON, MA 01331
11A-40	45 PHILLIPS ST	KNIGHT PROPERTIES, LLC	GHARABEGIAN, STEPHAN	405 WALTHAM ST # 396	LEXINGTON, MA 02421
11A-41	51 PHILLIPS ST	SHAFIE-ARDESTANI, REZA &SHOREH		99 WILDFLOWER DR	AMHERST, MA 01002-3436